

United States
Circuit Court of Appeals
For the Ninth Circuit. 6

UNITED STATES OF AMERICA,
Appellant,
vs.
THOMAS BEE WILLIAMS,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Eastern District of Washington,
Southern Division.

FILED

APR 17 1934

PAUL P. O'BRIEN,

CLERK

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD:

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Dept. of Justice,
Washington, D. C.,
Attorneys for Appellant.

WM. G. BOLAND,

Larsen Bldg.,
Yakima, Wash.

RUSSELL FLUENT,

Penbrook Hotel,
317 Marion St.,
Seattle, Wash.

Attorneys for Appellee.

United States District Court
Eastern District of Washington
Southern Division.

L-1709.

THOMAS BEE WILLIAMS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT.

The plaintiff complains of the defendant and for cause of action alleges:

I.

That plaintiff enlisted in the military forces of the United States on or about the 19th day of June, 1916; that he served in Company F, 116th Engineers of the American Expeditionary Forces until December, 1917, and with Company E, 2nd Engineers, until April 1st, 1918; that he was a casualty in hospitals and convalescent centers from April 1st, 1918, to the date of his discharge; that he was honorably discharged from said military service of the United States on the 28th day of May, 1919 and is now a resident of Yakima, Washington.

II.

That during the month of November, 1917, desiring against the risks of war, plaintiff, Thomas

Bee Williams, applied for and was granted a policy of war risk insurance in the sum of \$10,000 and thereafter there was deducted from his monthly pay the premiums for said insurance and a policy of war risk insurance was duly issued to him, by the terms whereof the defendant agreed to pay the plaintiff the sum of \$57.50 per month in the event he suffered total permanent disability to such an extent that he would be unable to follow continuously and substantially gainful occupation. [1*]

III.

That in the course of and while on active service with the Engineers of the American Expeditionary Forces, on the Verdun front, at Chateau Thierry and in Alsace Lorraine, in the rain and cold and under the adverse conditions of war, plaintiff contracted a severe cough and cold which remained with him and became aggravated from exposure and hardships and developed into active, chronic, pulmonary tuberculosis and chronic bronchitis, and and as a further result of all the foregoing he contracted chronic myocarditis and became extremely nervous and neuresthenic, all rendering him incapable of performing any work requiring physical exertion.

IV.

That by reason of the foregoing the plaintiff was discharged from the United States Army totally

*Page numbering appearing at the foot of page of original certified Transcript of Record.

and permanently disabled from following continuously any substantially gainful occupation and will never again be able to follow any substantially gainful occupation; that he became entitled to receive from the defendant under the terms of said war risk insurance policy, the sum of \$57.50 per month commencing on the 28th day of May, 1919, the date of his discharge.

V.

That plaintiff duly made proof of said total and permanent disability to the defendant and demanded payment of the aforesaid amounts; that an appeal was taken to the Administrator of Veterans Affairs on the 25th day of May, 1931, but the defendant has disagreed with the plaintiff as to his claim and the extent of his disability and so notified the plaintiff by a letter of disagreement dated the 28th [2] day of June, 1932, and has refused and still refuses to pay the same.

WHEREFORE plaintiff demands judgment against the defendant in the sum of fifty seven dollars and fifty cents (\$57.50) per month from the date of said total and permanent disability.

RUSSELL H. FLUENT,

Address #56 Penbrook Apts.,
4th & Marion,
Seattle, Washington.

W. G. BOLAND,

Address A. E. Larson Bldg.,
Yakima, Washington.

Attorneys for Plaintiff.

United States of America,
State of Washington,
County of Yakima—ss.

THOMAS BEE WILLIAMS being first duly sworn, on oath deposes and says; that he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

THOMAS BEE WILLIAMS.

Subscribed and sworn to before me this 20th day of July, 1932.

[Seal]

W. G. BOLAND,

Notary Public in and for the State of Washington, residing at Yakima.

[Endorsed]: Filed July 22, 1932 [3]

[Title of Court and Cause.]

ANSWER.

Comes now defendant, United States of America, and answering the complaint of plaintiff herein admits, denies and alleges as follows:

I.

Answering paragraph one of said complaint, defendant admits that plaintiff enlisted in the military service of the United States on the 19th day of June, 1916, and was honorably discharged therefrom on the 28th day of May, 1919, and denies each and every other allegation, matter and thing set forth and contained in said paragraph one.

II.

Answering paragraph two of said complaint, defendant admits that during the month of November, 1917, the insured applied for and was granted war risk term insurance in the sum of \$10,000, and that said insurance by its terms was payable at the rate of \$57.50 per month in the event of insured's total and permanent disability or death during the time when said insurance was in full force and effect, and further admits that premiums on said insurance were paid to include the month of May, 1919, and denies each and every other allegation, matter and thing set forth and contained in said paragraph two. [4]

III.

Answering paragraph three of said complaint, denies each and every allegation, matter and thing set forth and contained in said paragraph three.

IV.

Answering paragraph four of said complaint, denies each and every allegation, matter and thing set forth and contained in said paragraph four.

V.

Answering paragraph five of said complaint, admits that a disagreement exists between plaintiff and the United States Veterans Bureau as to the payment of said insurance, and denies each and every other allegation, matter and thing set forth and contained in said paragraph five.

WHEREFORE, defendant prays that plaintiff take nothing by reason of his complaint herein and that defendant have and recover its costs and disbursements herein.

ROY C. FOX,
United States Attorney,
E. J. FARLEY,
Assistant United States Attorney,
LESER E. POPE,
Chief Attorney, United States
Veterans Bureau,
Attorneys for Defendant. [5]

United States of America,
Eastern District of Washington—ss.

ROY C. FOX, being first duly sworn, upon his oath deposes and says:

That he is the duly appointed, qualified and acting United States Attorney for the Eastern District of Washington and that he makes this verification as such; that he has read the above and foregoing answer, knows the contents thereof and that the same is true, as he verily believes.

ROY C. FOX.

Subscribed and sworn to before me, this 20th day of July, 1933,

A. A. LaFRAMBOISE,
Clerk, United States District Court, Eastern District of Washington.

[Seal] By EVA M. HARDIN,
Deputy.

[Endorsed]: Filed July 20, 1933. [6]

October, 1933 Term October 14, 1933 11th day

Court convened pursuant to adjournment at 10 a. m.

PRESENT: Honorable J. Stanley Webster,
Judge, A. A. La Framboise, Clerk, Roy C. Fox,
U. S. Attorney, D. L. Hyatt, Deputy U. S. Marshal.

PROCEEDINGS.

[Title of Cause.]

Trial of case resumed, with the following witnesses, testifying on behalf of the defendant:

- 1 Dr. Albert C. Feeman
- 2 Dr. A. D. Tollefson
- 3 R. D. Lang
- 4 Harry Telfer)
- 5 Richard Snyder) By affidavit
- 6 Nick Visser)

Deposition of H. W. Hansen read.

Deposition of Dr. C. O. Decker, offered and refused.

 " of Dr. Paul J. Dailey " " "

Plaintiff rested.

Defendant moved for non-suit, which motion was denied.

Defendant moved for a directed verdict, in which motion the plaintiff then joined. The jury was then dismissed.

After argument of counsel, the Court rendered judgment in favor of the plaintiff and fixed the date of permanent and total disability as being February 2, 1919.

Extension of 90 days granted to file bill of exception.

J. STANLEY WEBSTER,

Judge. [7]

United States District Court
Eastern District of Washington
Southern Division.

No. L-1709.

THOMAS BEE WILLIAMS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED JUDGMENT.

This cause came regularly on for trial on the 12th day of October, 1933, before the Honorable J. Stanley Webster, Judge of the above entitled Court, the plaintiff, Thomas Bee Williams, appearing in person and with his witnesses and being represented by his attorney, Russell H. Fluent, and the defendant, United States of America, being represented by Roy C. Fox, United States Attorney and C. L. Dawson, Special Counsel for the Veterans Administration, and its witnesses, being present, a jury having been empaneled and sworn to try said cause, and the respective parties having submitted their evidence and rested, and the at-

torneys for defendant having made a motion for a directed verdict in favor of the defendant and the attorney for plaintiff having joined and having made a motion for a directed verdict for the plaintiff, whereupon the jury was dismissed, and the facts and the law having been fully argued and the trial having been concluded on the 14th day of October, 1933, and the Court on said 14th day of October, 1933, having rendered its oral opinion and decision in favor of the plaintiff to the effect that he became totally and permanently disabled on the 2nd day of Feb- [8] ruary, 1919, and in consequence thereof entitled to receive from the defendant the sum of fifty seven and 50/100 (\$57.50) dollars per month commencing on the said 2nd day of February, 1919, that being the amount due as monthly payments on a ten thousand dollar (\$10,000) policy of war risk insurance, requested in plaintiff's complaint, now, therefore,

It is ORDERED, ADJUDGED and DECREED that the plaintiff do have and recover from the defendant the sum of Ten thousand one hundred and twenty (\$10,120) dollars, that being the amount due under the \$10,000 policy of war risk insurance, at the rate of fifty seven and 50/100 (\$57.50) dollars per month commencing on the 2nd day of February, 1919, and continuing to the 2nd day of October, 1933, said payments to be made as by law in such cases provided.

It is FURTHER ORDERED, ADJUDGED and DECREED that Russell H. Fluent, attorney for

plaintiff, is entitled to receive and is hereby awarded from said judgment as a reasonable attorney's fee for his services in the above entitled cause, the sum of One thousand and twelve (\$1,012) dollars, that being ten per cent (10%) of said ten thousand one hundred and twenty (\$10,120) dollars, and that he is entitled to receive the further sum of ten per cent (10%) of each and every other payment hereinafter made by the defendant to the plaintiff, his heirs, executors, assigns and beneficiaries, in consequence of or as a result of the entrance of this judgment, said payments to be made as by law in such cases provided.

To all of which the defendant excepts and its exception is hereby allowed.

It further appearing to the Court that the above named plaintiff had heretofore on the 1st day of September, [9] 1919, reinstated Two thousand (\$2,000) dollars of his term insurance and converted the same to a 20-year endowment policy, which policy plaintiff now holds in conformity with the provisions of Section 307 of the World War Veterans Act, plaintiff is required to cancel and surrender up to defendant said converted policy before the judgment herein above entered becomes effective.

Dated this 15th day of December, 1933.

J. STANLEY WEBSTER,

United States District Judge.

O. K.

RUSSELL H. FLUENT,

Attorney for Plaintiff,

[Endorsed]: Filed Dec. 15, 1933. [10]

[Title of Court and Cause.]

PETITION ON APPEAL.

Comes now the United States of America, defendant herein, and says that on the 24th day of October, 1933, the Court entered a judgment against the said defendant, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of said defendant, all of which will appear more fully from the Assignment of Errors which is filed with this Petition.

WHEREFORE, the said defendant prays that an appeal may be allowed in its behalf to the United States Circuit Court of Appeals in and for the Ninth Circuit for the correction of the errors so complained of and that a citation my issue and a transcript of the record be sent to the said Circuit Court of Appeals.

ROY C. FOX,

United States Attorney.

E. J. FARLEY,

Assistant United States Attorney. [11]

It is ORDERED that the appeal prayed for in the above and foregoing petition be, and the same hereby is, allowed.

Dated this 10 day of January, 1934.

J. STANLEY WEBSTER,

United States District Judge.

[Endorsed]: Filed Jan. 10, 1934. [12]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant in the above entitled action, by Roy C. Fox, United States Attorney for the Eastern District of Washington, and E. J. Farley, Assistant United States Attorney for the same district, and in connection with its petition for an appeal herein and the allowance of the same, assigns the following errors which defendant avers occurred at the trial of said cause and which were duly excepted to by it at the time of said trial herein, and upon which it relies to reverse the judgment herein.

I.

The Court erred in denying defendant's motion at the close of plaintiff's case, for a verdict in defendant's favor, or, in the alternative, for a non-suit, on the ground and for the reason that the evidence adduced by and on behalf of plaintiff did not establish a prima facie case, and was insufficient to support a verdict, and on the further ground that there was no proof of any permanent and total disability occurring while the contract of insurance was kept in force and effect by the payment of the stipulated monthly premium [13] thereon, and on the further ground that the evidence affirmatively showed that plaintiff was not permanently or totally disabled, to which denial the defendant took exception at the time of the interposition of said motion herein.

II.

The Court erred in denying defendant's motion, at the close of all the evidence, for a directed verdict, upon the grounds and for the reason that the evidence adduced did not prove plaintiff to be permanently and totally disabled from following a gainful occupation during the time that his policy was in force and effect; and upon the further ground that the evidence affirmatively showed that the plaintiff was not permanently and totally disabled during the period that the policy sued upon was in force and effect, to which denial the defendant took exception.

III.

The Court erred in excluding from the evidence the depositions of Dr. C. O. Decker and Dr. Paul J. Dailey, which depositions were offered on behalf of defendant, to which ruling defendant excepted and exception was allowed.

IV.

The Court erred in denying the objection of defendant to the testimony of experts as to the ultimate facts, to which ruling defendant excepted and exception was allowed.

V.

The Court erred in entering judgment in favor of the plaintiff herein, as the evidence was insufficient to sustain a judgment.

ROY C. FOX,

United States Attorney.

E. J. FARLEY,

Assistant United States Attorney.

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR FILING
BILL OF EXCEPTIONS.

Upon application of the defendant made this date in open court, it is hereby

ORDERED that defendant's time for filing bill of exceptions in the above entitled cause be and is hereby extended to and until the 10th day of February, 1934.

Dated this 10th day of January, 1934.

J. STANLEY WEBSTER,
United States District Judge.

[Endorsed]: Filed Jan. 10, 1934. [15]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above entitled cause came on regularly for trial before the Honorable J. Stanley Webster, Judge of the District Court and a jury duly impaneled and sworn, plaintiff appearing in person and by his attorneys R. H. Fluent and W. G. Boland, defendant appearing by Roy C. Fox, United States Attorney, and C. W. Dawson, Special Attorney of the Department of Justice, and the following proceedings were had:

Plaintiff offered in evidence the testimony of the following witnesses:

TESTIMONY OF PLAINTIFF,
THOMAS BEE WILLIAMS.

Direct Examination.

The plaintiff being duly sworn, testified that he was the plaintiff in the action; that he entered the United States army June 19, 1916, and was then twenty years of age; that his occupation prior to the war was that of a laborer and that he followed kitchen work considerably; that he worked steadily prior to the war; that he had a sixth grade education; that at the time of entering the service he passed a physical examination; that after entering the service he [16] first went to the Mexican border and was there six months; that he returned from the border in December and was transferred into the Federal service; that at this time he was again given a physical examination; that in November of 1917 he applied for and was granted a policy of war risk insurance, this being after he was mustered into the Federal service; that he was detailed on detached service in Sandpoint, Idaho, for a short time and then went to Camp Mills, New York; sailed overseas November 26, 1917, with Company F, 116th Engineers. On arrival in France was transferred to Second Engineers of the Second Division. Went to the front with this organization about the latter part of February or March of 1918; was under artillery fire on several occasions, once at a little town on the Verdun sector where they were constructing dugouts, building fences, building barbed wire entanglements, and so forth;

(Testimony of Thomas Bee Williams.)

that while at the front plaintiff waded in mud night and days, often with no change of clothing; oftentimes slept in the rain; in the open, under fire, or in wet dugouts or cold billets, with no fire in them, and frequently lived on emergency rations; that the shell fire started in about nine o'clock and continued until five in the morning; that once a shell exploded close to the billet; that everybody rushed out and into a trench, other shells exploding close by; that one explosion scattered dirt and stuff on plaintiff and that two men jumped in the trench on top of plaintiff; that the next morning after this experience he was very nervous and his head seemed to ring; that he contracted a severe cough, had sweats and ran a fever and began to lose weight; that he went on sick report and was sent to a French hospital; that he was transferred to French Hospital No. 17, was there a short time and was transferred to American Hospital [17] No. 30 at Royat, France, where he remained approximately 90 days. He then went to Hospital No. 27 at Aigman, where he remained about four months, part of the time in the hospital and part of the time in a convalescent camp; that he saw no improvement in his condition while in the hospital, or in the camp; that he continued to lose weight, had a poor appetite, vomited, had pains in his chest, ran a fever, became very nervous and coughed constantly. That he sailed from France on the 17th day of January, 1919, arriving at Newport News, United States,

(Testimony of Thomas Bee Williams.)

February 2nd. The day he got on the boat he was taken sick and put in the sick bay hospital. Arriving in the United States, he was put in Camp Stewart Hospital; was there about 30 days and then went to Spartanburg, South Carolina, where he was in the t. b. ward. He was transferred from there to Fort Lewis, Washington, and discharged from the army May 28, 1919, and returned to Boise, Idaho. Worked for a construction company about eight days. Quit because unable to hold the job. Then worked in a cafe about a week or ten days. Then worked in the Pure Food Cafe at pantryroom work, handling vegetables and washing dishes; left there on account of sickness. Was examined at Boise, Idaho, and sent to Pierce's Tuberculosis Sanitarium at Portland.

“Mr. FLUENT: I offer in evidence plaintiff's army medical record—or A. G. O. and report from Dr. Pierce's Sanitarium at Portland, Ore.

Mr. DAWSON: I object to Plaintiff's identification No. 1 for the reason it's not a record of the A. G. office—it's a copy of certain entries from the records in the Adjutant General's office, and we have the full report here which we have no objection to if he wants to use it.

Mr. FLUENT: I haven't seen the full report.

Mr. DAWSON: Objection is made to Plain-

(Testimony of Thomas Bee Williams.)

tiff's identification No. 2 for the reason that it includes [18] self-serving declarations made by the plaintiff and more than the physical findings and diagnosis of the doctor.

Mr. FLUENT: All medical reports, your Honor, contain some complaints of the man—complaints *be* made at the time of the findings are not ——

The COURT: Objection overruled as to exhibit 2 and it will be admitted.

Mr. FLUENT: I will substitute these copies containing the Adjutant General's Orders for my Exhibit No. 1.

The COURT: Very well, let it be admitted.

WHEREUPON Plaintiff's Exhibit for identification No. 1, and No. 2, admitted in evidence and become Plaintiff's Exhibits No. 1 and No. 2." (R. 15-16.)

Plaintiff further testified that he was at Dr. Pierce's sanitarium about 40 days; that he was discharged and about January 5, 1920, was sent to Palo Alto, California, to a hospital; was there about two months; was then transferred to Whipple Barracks, Arizona, where he remained about two months, and was discharged from the hospital. Then went to Elcho, Wisconsin, where he worked on the public highway about 15 days. Left this employment because he was unable to do the work; that while working he became weak, coughed and spit blood;

(Testimony of Thomas Bee Williams.)

that drinking intoxicating liquor had nothing to do with quitting the job. That he then worked for the C. W. Fisher Lumber Company about June or July of 1920, approximately 30 days. The work was on the planer floor, taking lumber away from the planer and putting it on cars; that he was able to do this work while he lasted, but was weak all the time he was working, and at times laid off on account of weakness. Left the employment because too sick to work. His condition was weak and he could not carry on.

In 1921 he went to Johnson City, Tennessee, to the Old Soldiers' hospital. Was sent there by the United States [19] Veterans Bureau for tuberculosis treatment; was there about 15 days; returned to Chicago and entered the hospital at Camp Drexel on Drexel Boulevard and remained there a few days and then returned to Cavor, where he remained about a year, doing nothing. Moved to Crandon, Wisconsin; worked three or four days for one Fred Zane sawing wood. In December, 1923, moved his family to Yakima, Washington; lived there until the spring of 1924; went to work for the Cascade Lumber Company; worked about two weeks, taking lumber away from the re-saw. Took sick on the job and quit on account of a weakened condition. Had dizzy spells and fell on the job.

“Q. Why?

A. I was sick.

(Testimony of Thomas Bee Williams.)

Q. Did you drink any liquor at that time while on that employment?

A. Yes.

Q. How much and in what way?

A. Oh, I took a couple of drinks a couple of times.

Q. Did that have anything to do with your losing the job?

A. No.

Q. Did it have anything to do with your being sick?

A. No." (R. 21.)

In May of 1924 was sent to the Walla Walla hospital and was diagnosed tuberculosis, active. Was in and out of the hospital two or three times between May of 1924 and March of 1925. Was in about two weeks the first time; returned to Yakima; worked in August, 1924, for Mr. Day about six or eight days; was taken sick, coughed, spit up considerable blood; was unable to continue employment. Went back to the hospital in Walla Walla and stayed until the 25th day of March, 1925. Returned to Yakima, worked for a man by the name of Jackson two or three days; quit because he couldn't stay on the ladder; job was there for him if he was able to work; was too nervous to stand on the ladder; seemed [20] to shake all the time.

In the fall of 1925 he returned to Elcho, Wisconsin; went to work for Jagerson Fuel Company;

(Testimony of Thomas Bee Williams.)

not over ten days at the longest time; quit this work because he was sick; work consisted of tying edgings in the lumber yard and taking wood away from the convoys into the box cars; worked for the C. W. Fisher Lumber Company in the spring of 1926 for about 30 days. Left that employment because of condition; was in a weakened condition; had pains in side and chest and spit blood. Went to the hospital at the Soldiers' Home, at the National Soldiers' Home of Wisconsin, out of Milwaukee. Was in the t. b. ward for a few days and was then transferred to the Soldiers' Home department. Was there about two months and returned to Elcho. Did no work. It was January of 1927 when he returned to Elcho.

Worked for the Connor Lumber Company in the spring of 1927 about forty days; took sick; same weakened condition; couldn't carry on; quit this employment and went to work for [21] the Lake Shore Lumber Company at Washburn, Wisconsin. Was there about 15 days, then went to Eau Clair, Wisconsin; worked for the Lane Canning Company about 16 or 18 days; quit because too sick to work; hours too long. Was taking away cans from the cooler as they came out in the basket, wheels on it; would take these containers and deliver to different parts of the building. This was day work. Worked sometimes during the night. After quitting this employment he returned to Yakima where he worked for Mr. Fred Jackson; worked

(Testimony of Thomas Bee Williams.)

for a man by the name of Rayburn in the fall of 1927 during the fruit season, worked about a week, washing apples, lifting them back and forth. Was unable to do this work. That his parents were living in Yakima at this time. After leaving Rayburn's employment he didn't work again until the spring of 1928, then worked for Jackson and Cavanaugh at the Moxee Orchards; lived there about two years; considered it his home. Worked on several occasions for Jackson and Cavanaugh short periods; would have to lay off on account of sickness. Didn't work over 90 days in the two years. That his parents came to Yakima in the fall of 1928 and moved away again in the spring of 1930; that he left Yakima in the summer of 1928 and went to Portland, Oregon, where he was hospitalized from about September 2nd until October 16th; that the same old conditions as to health were present during this time. He returned to Yakima, worked a few days at Moxee; returned to Portland about the 6th of November, 1928, and worked in the Veterans Bureau hospital in the kitchen until the 3rd of December. Quit work on account of weakened condition; did no more work that winter. Went to the new hospital at Portland about January 5, 1929; was discharged the 2nd day of February, 1929, and returned to Yakima; worked for [22] Jackson and Ridge at Moxee Orchards in the spring, summer and fall of 1929; worked again for Jackson in 1930, about June or July, for a period of possibly two

(Testimony of Thomas Bee Williams.)

weeks; was unable to do work. Then worked for a man by the name of Kilgore near Jackson's place, in 1931, for about eight days; had pleurisy pains in chest, weakened down and quit this on account of sickness.

He has two daughters, one ten and one twelve; that he was under the care of Dr. Ganson at Yakima; that Dr. Ganson is now dead. That he also saw Dr. England and a Dr. Smith, the county doctor. That he went to the Washington Tuberculosis Association and the doctor there examined him; that this doctor's name was Balingier; that this was in 1924; that his physical troubles still bothered him; that he is still losing weight, has night sweats, coughs considerably, raises lots of mucous, often with blood, heart bothers him, pains in chest and fever; sleeps hardly at all, and was nervous all the time. Made two attempts to work at thinning apples since 1931; worked for a Mr. Greeting for about two weeks, and for a man by the name of Ames at Selah; quit these jobs on account of sickness; never lost any jobs on account of drinking.

That when he enlisted in the army he weighed 149½ pounds, stripped; that he reached a weight of 167 or 170 pounds while in the army; that he now weighs 145 pounds.

Plaintiff then identified Exhibit No. 3, a picture of himself taken in June of 1917 at Priest River, Idaho. Exhibit No. 3 admitted.

(Testimony of Thomas Bee Williams.)

He further testified that he drank occasionally, took one or two drinks; sometimes four or five; that he was not able to drink large quantities of liquor; that he drank [23] because he became nervous, exhausted and discouraged, and couldn't control himself and took a drink to forget it. That he has nervous convulsions and becomes unconscious; that he has these convulsions whether he drinks or not; that drinking checks his feeling of nervousness; that he started drinking to get intoxicated in 1920; that it took 4 or 5 drinks to make him intoxicated; that sometimes it would be two weeks, sometimes a month, sometimes three or four months that he would go without taking a drink; that the periods between drinking are shorter now than they were in 1922 and 1923.

Cross Examination.

Plaintiff testified that at the time of his discharge May 28, 1919, he was given a physical examination by the medical staff of the United States army; that there were several doctors and he didn't remember how many; that he was then released from the hospital just before his discharge; that he then went to Boise, Idaho, and started working on a construction job where he worked about eight days; that he was taking brick off the old Central School building and loading them into a wagon, and shoveling the debris into wagons. That he then went to Pierce's Sanitarium in August of 1919; that he was dis-

(Testimony of Thomas Bee Williams.)

charged and went to Palo Alto and from there to Whipple Barracks, Arizona; that he was in Whipple Barracks and Palo Alto about three months.

“Q. You had some trouble down there and you were discharged for being drunk, weren't you?”

A. That was the charge, yes.” (R. 37.)

That he was in several hospitals after leaving Whipple Barracks; that the next hospital he was in in 1921 was in Johnson City, Tennessee; that he did not remember having any trouble at that place; was there not over two weeks; [24] that he went A. W. O. L. from Johnson City after he had been there about two weeks; that he was in the Drexel Hospital in Chicago in 1922 about thirty days; that he doesn't remember whether it was for observation or treatment; that in 1920 he was married, but isn't married now; that he doesn't remember of being in any hospitals in 1923, but was in Walla Walla hospital, Washington, a short period in 1924.

“Q. And you went to that hospital to find out if you had anything wrong with you, did you not?”

A. They sent me there with T. B.” (R. 40.)

That he went A. W. O. L. in Walla Walla the first time he was sent there; that he was returned again that same year, but doesn't remember how long he stayed.

(Testimony of Thomas Bee Williams.)

That he lived in Elcho, Wisconsin, in 1920 and that he was married there; that he did some drinking in 1920; that he lived part of the time in Yakima and part of the time in Elcho, Wisconsin, through the years 1920 to 1932; that he would stay a few months each year in Elcho, Wisconsin, or Devorre or Cranston; that he went back to Elcho in 1925, and lived there through 1925, 1926 and a part of 1927; was in Yakima in 1928. He wasn't in Elcho in 1929, or 1930, or 1931, but was in Elcho in the fall of 1932.

That he knows men by the names of Harry Telfer, Rich Snyder and Nick Visser; that these men knew him while he was living in Elcho, Wisconsin; that he knows a doctor by the name of Paul J. Dailey, who examined him two or three times at Elcho, Wisconsin, in the summer of 1920. He also saw Dr. Dailey a number of times on the street in Elcho; that he saw him quite often. That he drank some while he was in Yakima in 1924; that he was in the Walla Walla hospital in March of 1925 and was discharged for drunkenness. He returned to [25] Yakima and then to Wisconsin in the fall of 1925; that he worked loading slabs on cars for Jagerson at Elcho, Wisconsin, in the year 1926.

Plaintiff then identified Defendant's Exhibit A as to the signature on the bottom being his signature.

That Exhibit A was a claim for lost wages for twelve days at \$2.65 a day while reporting for

(Testimony of Thomas Bee Williams.)

physical examination, but doesn't remember whether this was because of a layoff while working at Jager-son's; that he received \$31.80 for reporting at Milwaukee at the Soldiers' Home for physical examination.

Plaintiff further testified that he knows a Dr. C. O. Decker, living in Wisconsin, and he also knew a H. W. Hanson living at Elcho.

That he went into the vocational training for a while in the winter of 1922 or 1923 at Nauvoo, Illinois; that he followed this vocational training 17 or 18 days and quit of his own accord.

That he doesn't remember whether he was intoxicated at Yakima on July 12, 1924, or February 2, 1925; that he couldn't remember any dates when he was intoxicated or fined, but that he had been in jail there at different times for drunkenness on dates that he could not remember; that he had been arrested for drunkenness at Yakima, approximately twenty times; that the date of his last arrest for drunkness in Yakima was August 2, 1933; that he wasn't intoxicated while in the Walla Walla Hospital in July, 1929; that he has been intoxicated a number of times in Wisconsin; that it wasn't his practice to work a few days in the apple orchards and get a little money and spend the money for whisky; that he made him home on the Jackson ranch for two or three years; that he [26] worked there occasionally, picking apples; that he frequently walked up and down the street in Yakima known as the Skid row.

(Testimony of Thomas Bee Williams.)

The Court then instructed the jury that the purpose of admitting the testimony concerning the use of intoxicating liquor by plaintiff was for the purpose of shedding light on the extent to which he indulged in the use of intoxicating liquors, the effect it might have on his health and not for the purpose of impeaching or discrediting him as a witness; that the indulgence in intoxicating liquor is a petty offense, not regarded in law as impeaching the character of the witness.

Re-Direct Examination.

Plaintiff testified that Dr. Dailey and Dr. Decker were both his private physicians and charged him a fee at the time they visited him in Wisconsin.

Plaintiff then identified plaintiff's Exhibits Nos. 4, 5 and 6 as documents relating to his vocational training; and plaintiff's Exhibit No. 7, also identified, being a voucher for loss of work claimed in July of 1929.

Plaintiff then offered in evidence plaintiff's Identification No. 8, being the medical reports taken from the Veterans' files of Thomas Bee Williams.

Objection to the introduction of these files contained in Identification No. 8, was interposed by the Government on the ground that paragraph five of the report of physical examination on January 13, 1920, contained self-serving declaration by the plaintiff and was not a part of the physical finding by the physicians, and paragraph 11 is a prognosis of the doctor, and questions Nos. 13, 14, 15, 16, 17 and

(Testimony of Thomas Bee Williams.)

18 relate to no part of the doctor's physical findings, but refer to the prognosis and the opinion of the doctor not based on his findings. [27]

Whereupon the Court admitted that portion of the medical reports in so far as they are confined to the examinations made by the physicians and the findings of the physician as the result of the examination and excluded the portions of the physical examination reports not within those limits.

At this point it was stipulated between counsel that those portions of plaintiff's Exhibit No. 8 held to be competent should be read to the jury later in the trial.

ELMER DAY,

called as a witness for plaintiff, testified on

Direct Examination.

That he knew plaintiff; that plaintiff worked for him eight or ten days in August of 1924 or 1925; that he was sober while on the job; that he noticed that he was in a weak and run down condition and had to quit; that the last day or two he worked he coughed a little; that he would have continued him in his employ if plaintiff hadn't quit; that he saw him at his house the next morning after he took him in town; that plaintiff was in bed, all in and had a slight hemorrhage; spit blood in the waste paper basket.

(Testimony of Elmer Day.)

“Cross Examination

“By Mr. DAWSON:

Q. That was the first time you knew him?

A. The first time I knew him.

Q. Did he work for you only the one time?

A. Only time to my recollection.

Q. Have you come in intimate contact with him from that time on?

A. No—I saw very little of him since.

Q. The plaintiff was a rather heavy drinker, was he not?

A. I couldn't tell you—I never was out with him.

Q. Do you remember talking to the Department of Justice investigators with reference to this case?

A. There was a man seen me last fall some time about it—I don't remember who he was.
[28]

Q. Didn't you talk with a Department investigator a week or ten days ago about this case? A. No.

Q. You don't remember telling the Department of Justice investigator this man was a heavy drinker?

A. He spoke of his drinking—propably he did—he didn't drink to my knowledge any time he was with me.

Q. You didn't state he was a heavy drinker—drinking anything he could get his hands on?

A. No.

(Testimony of Elmer Day.)

Re-Direct Examination

By Mr. Fluent:

Q. What kind of work was it you had him doing?

A. Making mortar, carrying brick.

Q. Why was it he had to quit? Was it drinking caused him to quit his work?

A. No, he simply weakened and couldn't stand it—I don't think it was drink caused it—he hadn't been drinking any while he was working for me."

FRED JACKSON,

called as a witness on behalf of plaintiff, testified that he had known plaintiff since 1924; that plaintiff worked for him in 1924 and in 1931; that he figured plaintiff had worked about 120 days for him altogether, not more than two or three weeks at any one time; that plaintiff was sober during the time he was employed by witness; that he complained of his lungs and pleurisy in his side and that he had noticed plaintiff spit blood; that he did his share of work on the job, but sometimes had to quit; that he never gave plaintiff any heavy work; that he would work sometimes three days, sometimes a week, and then quit. That he quit sometimes on account of weakness; sometimes he quit at night; sometimes

(Testimony of Fred Jackson.)

at half past ten in the morning; that had plaintiff been able to work, he could have worked from March to November, both in 1928 and 1929.

“Q. How much work would you say he could have done—that you would have had him do had he stayed at the work there over that period of time from '24 to '31?

A. Oh, I imagine three years.” (R. 60)

On Cross Examination

the witness testified that he was operating an orchard in the Yakima Valley in conjunction [29] with his brother; that in 1924 they were running their mother's ranch and in 1926, 1927 and 1928 he was running by himself. That plaintiff worked well when he worked. He remembered in 1929 plaintiff quit work one morning at half past ten; that plaintiff was sick; that he never saw plaintiff drunk but once, and that wasn't while he was working; that he saw him drunk out at Fruitville, but not while plaintiff was working for him; that he knew plaintiff was in jail frequently for drunkenness, but he didn't know how many times. That plaintiff frequently told him when he had been absent, that he had been in jail, arrested for drunkenness, but claimed that sometimes he wasn't drunk. That he and his family were very close friends of the plaintiff's, and he felt very sympathetic towards plaintiff and tried to help him all he could.

W. F. WILLIAMS,

called as a witness on behalf of plaintiff, testified that he was the father of plaintiff; that prior to the war plaintiff worked as a delivery boy for a store and as messenger for the Western Union; that he also [30] worked as a pantryman prior to the war; that plaintiff lived at home prior to the war; that he saw him shortly after he came back from the army and just before he was discharged; that at that time plaintiff looked quite cut down and didn't look as husky as he used to; that he had seen a lot of plaintiff since they moved to Yakima; that he lived near the Jackson place at Yakima; that plaintiff couldn't stand anything. He would work a little while at a time and then have to lay off; that plaintiff spit blood at times, complained of shortness of breath and so forth; that he was drinking some of the time at home, but would lay off for long periods of time. That plaintiff was very nervous, would almost go into convulsions at times.

On Cross Examination

witness testified that he was living on the Jackson and Cavanaugh ranch; that he came from Wisconsin to Yakima in 1923; that he had lived in Yakima for fourteen years straight; that plaintiff and his wife moved out here and then went back to Wisconsin; that they split up and plaintiff's wife went back home; that he judged that plaintiff spent about twenty per cent. of his time back in Wisconsin after they had come out to Yakima.

DR. C. R. DUNCAN,

called as a witness on behalf of plaintiff, testified on

Direct Examination,

that he was a physician and surgeon, graduate of the State University of Iowa about 1909; has been engaged in the practice of medicine ever since; licensed to practice in the State of Washington and carrying on a practice in Yakima; that he has handled cases of tuberculosis in his practice; that he had examined plaintiff about two or three weeks prior to the trial and once about two or three years prior to the trial; that on the last examination he examined his heart, lungs, nervous sys- [31] tem, but that no X-rays were taken of the chest. Upon voir dire examination by the defendant, witness further stated that in taking the examination he had taken a history from plaintiff; that he knew this case was pending in court and that he made this examination for the purpose of qualifying himself to testify as an expert in the case. That to a certain extent he took the plaintiff's history into account in making the diagnosis and that that constituted a part of the diagnosis.

Objection was then interposed to the testimony of the witness giving an opinion or a diagnosis of plaintiff's condition upon the ground and for the reason that the said diagnosis was based on a self-serving declaration and history given by the plaintiff himself.

Objection was overruled.

“Q. What history did he give you?

Mr. FOX: To which we object—

(Testimony of Dr. C. R. Duncan.)

The COURT: And the objection is sustained.

Q. What were your findings? (R. 69)

The witness then stated that he found tubercular breathing throughout both lungs, more perceptible on the right side and upper right side; that there was a certain amount of soreness which indicates that he has had in the past a severe inflammatory condition of the chest that has given rise to a filling in of fibrous tissue and disturbance to the lung tissue.

The witness further stated that from these findings he was able to diagnose the condition and that in his opinion plaintiff was suffering from a chronic tubercular condition; that it was in an advanced stage, but not active at the present time; that he prescribed that the plaintiff should not work at hard labor or expose himself and should live a quiet, easy life; that rest is essential at all times in the treatment of tuberculosis; that labor would aggravate his condition; that, in his opinion, the man should never engage in hard [32] labor; that he couldn't engage in work of any kind continuously.

The following hypothetical question was put to witness:

Q. Bearing in mind this definition of permanent and total disability—an impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, when such disability is founded

(Testimony of Dr. C. R. Duncan.)

upon conditions which render it reasonably certain that the same will continue through the life of the person suffering from it, and also, bearing in mind the examination you made of Thomas Bee Williams, and assuming these facts to be true for the purpose of this hypothetical question; assuming that Thomas Bee Williams went as far as the 6th grade in school, and his occupation prior to entering the military service was that of laborer and pantry man—that he entered the military service on the 19th day of June, 1916, at the age of twenty years, after he was given a physical examination for entrance into the military service and was accepted, and shortly after entering the army he was sent to the Mexican border where he remained for about one year—rather where he remained for six months; that he went over seas in 1917; that he was engaged in active service with Company “F” Second Engineers from December, 1917, to May, 1918; that he was on the Verdun front; that his duty was near the front line; that in June, 1918, he was sent to a French Hospital with congestion in the apex of the right lung; and from there was transferred to base hospital No. 30, where he remained until August 14, 1918, with suspected incipient pulmonary tuberculosis, and bronchitis, acute, catarrhal; that he was then sent to base hospital No. 27, and [33] remained there from August 28, 1918, to October 22, 1918; he was then placed in a convalescent camp where he remained about three months, and was

(Testimony of Dr. C. R. Duncan.)

then sent to St. Nazarre, France, where he embarked for the United States on January 17, 1919;

That he took down en route and was in the sick hospital on the boat and upon debarkation he was placed in the hospital at Newport News, Virginia, from February 2, to February 27, 1919, on account of tuberculosis pulmonary, chronic, active, middle and upper right and left apex, and from there was transferred to the United States General Hospital at Spartanburg, South Carolina, where he remained from February 28, 1919, to May 7, 1919, on account of tuberculosis, pulmonary, chronic, and from there he was sent to United States base hospital, Camp Lewis, Washington, where he remained until he was discharged from the army May 28, 1919. After his discharge he went to Boise, Idaho, and worked for about eight days for a construction company, and about twenty days in two restaurants; that in August, 1919, he was sent to Pierce Sanatorium in Portland, Oregon, where he remained about two months; that two or three months thereafter he was transferred to United States Public Health Hospital at Palo Alto, California, where he remained about three months, when he was transferred to Whipple Barracks, Arizona, where he remained for two months; that in July, 1920, he worked for a lumber company at different times, totalling about *onw* month; that in July, 1921, he was transferred to the Old Soldiers Home at Johnson City, Tennessee, for two weeks; that he was

(Testimony of Dr. C. R. Duncan.)

a patient in the United States Public Health Hospital, No. 30, at Chicago for about a month in February and March, 1922, and for about a month a year later on account of tuberculosis; that he entered vocational training at Nauvoo, Illinois, and discontinued after [34] eighteen days; that thereafter he worked for the Cascade Lumber Company at Yakima in the spring of 1924 for about two weeks, and for Elmer Day at Yakima about ten days in the spring of 1924; that he was admitted to the United States Veterans Base Hospital at Walla Walla on May 5th, 1924, on account of tuberculosis, active; that he then worked for a short time for Fred Jackson at Fruitville, Washington, in the fall of 1924 and in the same fall went to the United States Veterans Bureau Hospital, at Walla Walla on account of his tuberculosis and remained for about a month; that he again entered this hospital in February, 1925, and was discharged one month later, in March, 1925; that he worked for a fuel company in Elcho, Wisconsin, for ten days in the winter of 1925 and for the Fish Lumber Company about ten days in the spring of 1926 and for the Connor Lumber Company at Leona, Wisconsin, in the spring of 1927 for a short period of time and for the Lake Shore Lumber Company in Wisconsin for a short period of time the same spring; for the Lang Canning Company at Eau Claire, Wisconsin for ten days in 1927 and for Jackson and Hilgore at Moxee, Washington, in the fall of 1928

(Testimony of Dr. C. R. Duncan.)

and '29 for a period of about two weeks; that he was again in the United States Veterans Hospital at Portland, Oregon, for about six weeks in the fall of 1928, on account of his disability; that he worked for Fred Jackson at Naches Heights for at least three weeks in the fall of 1930 and about the same period of time in the fall of 1931; that he worked for one Kilgore about eight days in May or June of 1931; that he was in the United States Veterans Bureau Hospital at Walla Walla for about two weeks in August, 1931 and that he has done no work since the fall of 1931 except a period of six days, or about two weeks; have you an opinion as to [35] whether or not he was permanently and totally disabled at the time of his discharge from the United States Army on May 28th, 1919?

Objection was interposed by the Government on the ground that the hypothetical question did not fairly and accurately set out the matters in evidence, and upon the further ground that the answer called for a statement of ultimate fact and thus invaded the province of the jury, which objection was overruled and exception noted.

The witness then testified that in his opinion plaintiff was totally and permanently disabled at the date of his separation from the service.

Witness further stated that he believed that a case of incipient tuberculosis could be absolutely cured, but that in the case of plaintiff, he believed that a permanent arrest was not possible, and that while plaintiff's tuberculosis might be arrested for

(Testimony of Dr. C. R. Duncan.)

a time, it would break down with fatigue and become active and be so throughout the man's life.

“Cross Examination

“By Mr. Dawson:—

You are a doctor in the general practice of tuberculosis?

A. The general practice of medicine.

Q. And you have not made any specialty of tuberculosis?

A. Yes, sir. A few years ago I took quite an active interest in tuberculosis and have had a great many tubercular patients.

Q. Have you ever been in a hospital in charge or supervision of tubercular patients?

A. No, sir.

Q. You took no special course as far as tuberculosis is concerned?

A. I took a very active interest in tuberculosis and did a lot of advanced work in the reading and history of tuberculosis and took care of tubercular patients here—ten or twelve years ago I had a lot of patients.” (R. 78-9)

The question was then asked: “Can you tell me [36] the American standard for diagnosis of active tuberculosis?”

A. I don't know as I can tell in the exact words. I can tell you the standard for diagnosing tuberculosis.

(Testimony of Dr. C. R. Duncan.)

Q. Can you tell us the five things upon which they base a diagnosis of active tuberculosis?

A. You only need one thing.

Q. What is that?

A. Finding tubercle bacillus.

Q. A man may have active tuberculosis without sputum? A. He may have."

The witness further testified that he did not take X-rays; that he had examined the patient twice and that he probably consumed thirty minutes in making the examination.

He further stated that at the time of the first examination, he made an examination of plaintiff for heart trouble, but that he was positive that plaintiff was tubercular and advised him to do nothing except rest, but that at the time of his recent examination he did not find any active tuberculosis; that arrested tuberculosis meant that the activity was arrested, but that he did not believe that any person having tuberculosis was absolutely cured. You could only speak of him as having an arrested case. That this was a matter of personal opinion of every doctor, and that his opinion was that once an arrested case of tuberculosis flared up, that the patient was out of luck.

"Q. That is your experience?

A. Yes.

Q. Isn't it a fact there are thousands of men with arrested tuberculosis who are working every day?

A. Yes sir.

(Testimony of Dr. C. R. Duncan.)

Q. Isn't it a fact that every member of the Caucasian race has tuberculosis germs in his system?

A. I believe every man or woman has at some time. (R. 81)

Q. Isn't it a fact that active tuberculosis if it once becomes arrested, whatever tuberculosis they [37] have acts as a vaccination against subsequent attacks?

A. To a great extent. If it wasn't for that fact a lot of people would die from tuberculosis that don't die.

Q. And that's the reason the germs having been in the white race so long have built up that immunity, isn't that true?

A. I presume you might say that's true.

Q. That's why an Indian or colored man who gets tuberculosis has no resistance, isn't it true?

A. I don't know." (R. 82-3)

That tuberculosis might be classified as incipient, moderately advanced, and far advanced.

"Now the plaintiff has a diagnosis on the 13th day of November 1925 of tuberculosis minible, arrested—

A. That would be not active.

Q. If this man had had active tuberculosis on the date of his discharge from military service and he was examined in 1925 and found to have tuberculosis minimal and arrested,

(Testimony of Dr. C. R. Duncan.)

there wasn't much activity between 1919 and 1925 would you say?

A. It don't seem so.

Q. If he had a diagnosis on March 25, 1925 of tuberculosis, pulmonary, chronic, moderately advanced, quiescent, would that indicate any activity at that time?

A. You have one "Minimal" and another one "Moderately advanced"—there must have been tuberculosis in the meantime.

Q. Well that depends on the man who examined him?

A. That is just what I am trying to get over.

Q. Now if a man had a diagnosis on June 1st, 1929 of inactive tuberculosis, probably arrested, that would indicate there was no activity at that time, would it not?

A. That man said "probably arrested"—he was guessing too." (R. 83-5)

The doctor further testified that it wasn't necessary to put a patient in the hospital and observe him for the purpose of making a diagnosis of tuberculosis; that the effect of heavy drinking on a tubercular patient would be adverse; but that a moderate use of alcohol would be beneficial; that he could not remember the date of his first examination; that he kept no office notes and that the only treatment he recommended was that plaintiff take life easy; that tuberculosis usually attacks the up-

(Testimony of Dr. C. R. Duncan.)

per lobe of the lung, but that he had found it in other places; that cavities in tuberculo- [38] sis were caused from destruction of the lung tissue, but that it was possible to have tuberculosis year after year and not have cavitation.

On Redirect Examination

the following question was asked the witness:

“Q. If a man is diagnosed on February 19, 1919 and is diagnosed in 1921 pulmonary tuberculosis arrested, moderately advanced, and is diagnosed in October, 1922, pulmonary, chronic, apparently arrested, moderately advanced; diagnosed April 2, 1925, tuberculosis, pulmonary, chronic, moderately advanced, and on March 25, 1925, tuberculosis, pulmonary, chronic, moderately advanced, quiescent—would you say that his condition after that time was in the incipient, moderately advanced or far advanced stage?

“A. At that time I would say he was markedly advanced.” [39]

Dr. J. L. McDONALD

testified on behalf of plaintiff, that he was a graduate of the Medical College of Virginia, 1910 and had been engaged in the practice of medicine 23 years, and was licensed to practice in the State of Washington. That he had examined and treated a large number of cases of tuberculosis; that he worked in the south for a period of three years

(Testimony of Dr. J. L. McDonald.)

when he encountered a great deal of tuberculosis, especially among the colored people; that he examined plaintiff on the 5th day of October, 1933; that he gave a physical examination and fluoroscopic and X-ray examination. He examined plaintiff's lungs with a stethoscope and had X-rays of the chest.

The X-rays were produced and identified, offered and admitted in evidence as Plaintiff's Exhibits 9 and 10. The witness then explained the X-ray pictures; that the X-ray was a picture of plaintiff's chest, pointing out the different organs and lobes of the lungs; that the air passages take black under an X-ray, and that the white streaks in the X-ray was where the air wasn't going into the lung; that a mottled condition was always indicative of tuberculosis; that the picture indicated that the plaintiff had tuberculosis of the lungs and that his condition was one of long standing. That in the examination he found a rale at the base of the mottled lobe on the right side; that rales indicate tubercular activity or mucus in the lung.

From his examination he made a diagnosis of tuberculosis, moderately advanced in both lungs; that the only treatment to be prescribed was going into a dry climate and with mental and physical rest; that absolute rest is essential for the treatment of the plaintiff and that it would be injurious to his health to engage continuously in any kind [40] of work; that his condition was reasonably certain to last throughout his lifetime.

(Testimony of Dr. J. L. McDonald.)

The same hypothetical question as asked of Dr. Duncan was then put to the witness, the same objection interposed by the defendant, which objection was overruled and that witness then testified that plaintiff, in his opinion, was totally and permanently disabled at the date of his separation from the service on May 28, 1919.

On Cross Examination

the witness testified that he examined plaintiff October 5, 1933; that he had seen him once about a year prior to that time; that at the time of the last examination he knew that the case was pending in court and that he examined him for the purpose of qualifying himself as an expert witness to testify in the case. That he had appeared as a witness in a number of war risk insurance cases; that the fee he was to receive for his testimony was contingent upon plaintiff winning the case and that he would not come into court for less than a fee of \$250; that he was engaged in the general practice of medicine.

The doctor then pointed out what he described as the mottling in the X-rays, stating that the normal lung would show black. The question was then asked:

“Q. Doctor, you said you found one rale in the middle lobe?

A. No, you can't find one rale—there are a number—I meant in a small area.

Q. Would you make a diagnosis on tuberculosis on that?

(Testimony of Dr. J. L. McDonald.)

A. Yes, with all the history and physical findings and the fluoroscopic examination and the X-ray on up to the present, I would.

Q. Did you take into consideration his history?
[41]

A. I did take into consideration his history because I knew his history.

Mr. DAWSON: In view of the doctor's statement, I now move his testimony as to physical findings, be stricken from the record, the physical findings the result of October 5, 1933, examination.

The COURT: He said he knew his history.

Mr. FLUENT: Q. Did you render your opinion here in court on your findings from the examination you made of the man.

A. No. All physical examinations consist of history first and the physical examination last. Any man that will examine a person without the history—I don't know what to say, it's one of the rules history first. A person comes into your office and says, "Doctor, I am sick"—"Well, you are sick—how long have you been sick and where are you sick" and he may date that back twenty five years and give you a history all the way up to the present time and you certainly have to take that into consideration.

Q. Could any doctor make a finding that would be correct?

Mr. FOX: I object—

The COURT: The question involved here is a question of law and not a question of medicine. This

(Testimony of Dr. J. L. McDonald.)

physician examined this man not for the purpose of treating him, he examined him for the purpose of testifying in this case. Now it's clearly settled in the books the statements and declarations of a patient made to a physician under those circumstances are not competent because the witness would be disposed to mislead, if he could, or make false statements. He is not consulting the doctor for treatment under such circumstances. [42] The usual examinations of that sort could not be based on the statement of the patient. All you can prove by this physician is what he found as a result of that examination, or if he had a history of the patient from a reliable source other than the patient himself he could go into that.

Mr. FLUENT: I gave the doctor a hypothetical question.

The COURT: Your question was all right but the opinion of this doctor which takes into account, apparently so, unfortunately, what the plaintiff told him——

Q. What are your findings from the X-ray and the stethoscope and fluoroscope and your examination of the plaintiff himself, what are your findings from those examinations:

A. Moderately advanced tuberculosis, possibly active.

Mr. DAWSON: I object to that and move that the answer be stricken for the very reason this doctor said he would have to take into consideration those findings.

(Testimony of Dr. J. L. McDonald.)

The COURT: No—the motion will be denied.

To which ruling the defendant excepts.

The COURT: He didn't have to rely on anything the patient told him after the examination. He didn't have to rely on what the patient told him after what the X-ray showed. He didn't have to rely on what the patient told him as to the rales in his lung—there are many things he could rely on without taking into account the history at all.”

MARGARET MARY CASSIDY,

called as a witness on behalf of plaintiff, testified that she had been a public health nurse since 1918. That she knew the plaintiff; that she was not connected with the Washington Tuberculosis Association, but they furnish clinical service to the public health depart- [43] ment. She recalled that plaintiff was examined in April of 1924 by Dr. Balinger, who is no longer a resident of Yakima. She testified that a record of the examination was kept in the office; that it was a copy of the original, and a copy of the examination report was signed by the doctor. The report of Dr. Balinger's examination was then identified and offered in evidence. Objected to by the Government and objection sustained. Witness excused.

DR. HENRY STORGAARD,

called as a witness on behalf of plaintiff, testified that he was a physician and surgeon, graduated from the Chicago Hospital College of Medicine in the year 1916, and has been engaged in the practice of medicine since that time and licensed to practice in the State of Washington, with offices in the Larson Building, Yakima.

“Q. What experience have you had, Doctor, with the examination, care and treatment of tuberculosis?”

A. About the average experience of the average general practitioner in addition to that of a health officer for five years in a community of this size.” (R. 107)

That he had had experience of a general practitioner, in addition to five years experience as health officer in the community; that he examined the plaintiff first in 1931 and treated him for pleurisy, and that he had examined him on several occasions since, probably six or eight times, physical examinations and had X-rays taken; that the examinations were general in character, including the chest and heart; that he had X-rays taken but did not interpret his own X-rays, allowing some one else to do that for him.

From his examination, including the X-ray, which he did not himself interpret, he had rendered a diagnosis of chronic, moderately advanced, pulmonary tuberculosis, pleurisy and cardiac, hypertrophy. That in his examination he found [44]

(Testimony of Dr. Henry Storgaard.)

moist rales in both upper lobes in the first examination and tubercular breathing, dullness on percussion, the upper part of both lungs, limitation excursions of diaphragm; limited expansion on breathing and pain on inhalation, particularly on the right side in the chest wall; that he would prescribe rest, good nourishing food, get up in a high altitude and take a little medicine occasionally; also see a physician about every two or three months; keep a check on this heart condition and the progress of his case; that in his opinion it would be injurious for plaintiff to engage in any kind of work continuously, and that performance of labor would result in breaking down too much of the lung tissue.

In his opinion, plaintiff's disability was reasonably certain to last throughout his life.

The same hypothetical question as put to Dr. Duncan and Dr. McDonald, was then propounded to witness, the same objection made by defendant and overruled by the Court.

In answer to this hypothetical question, the Doctor gave as his opinion that plaintiff was totally and permanently disabled at the date of his discharge from the United States Army May 28, 1919.

On Cross Examination

the Doctor testified in substance: That he had examined plaintiff first in 1931; that the examination took 15 to 20 minutes; that it was made in his office; that on the subsequent occasions he had just looked over plaintiff, probably four or five minutes and

(Testimony of Dr. Henry Storgaard.)

strapped up his chest; the strapping up of his chest was for pleurisy. That pleurisy was a very common condition to find in tuberculosis; that the fee he was to charge for his testimony was not contingent on the outcome of the law suit; that [45] he had been paid for his medical services, but had not been paid his witness fees; that he was charging the plaintiff for his testimony whatever the plaintiff chose to pay; that he found the plaintiff's tuberculosis in 1931 active; that he had no record of his examinations; that his files and records had been lost and he was testifying from memory absolutely; that the records had been lost between the first day of September and the first day of October, 1933; that he found active tuberculosis in 1931; he did not report it to the health board.

“Q. When you found this plaintiff active in 1931 did you report that to the State Board of Health? A. No sir.

Q. You didn't report it?

A. It was reported before that.” (R. 114)

DR. ROYAL B. TRACY,

testified on behalf of plaintiff; that he was a physician and surgeon, graduated from the University of Missouri in 1908; that he was licensed to practice medicine and surgery in the State of Washington; that he had been in the medical corps during the World War about 22 months; that his first duty

(Testimony of Dr. Royal B. Tracy.)

was on the front line, but he was transferred to the base hospital where he observed the effect of shell shock and mental injury to the soldier; that he specialized in nervous and mental diseases; that he had specialized in that branch for about 16 years.

“A. After I was discharged from the service in 1919 on June 30th, I received appointment as Contract Physician, consulting neurologist for the Veterans’ Bureau at Albuquerque, New Mexico. I held that position for a period of two years.

Q. What did you do after that?

A. I was with the state hospital for the insane in New Mexico for a period of two years after leaving the Veterans’ Bureau service at Albuquerque, afterwards I was consulting neurologist for the State Hospital at Warm Springs.

Q. When was that?

A. That was in 1923 and ’24 and a part of ’22. I held the position of Associate Supervisor which really [46] means I held the position because of the fact that the Supervisor himself wasn’t a specialist in insanity and nervous diseases.” (R. 116)

That he left Montana in 1924 and took his State Board here in Washington and within six months he was appointed consultant in the King County hospital for nervous diseases; that he held that posi-

(Testimony of Dr. Royal B. Tracy.)

tion for a period of 21½ years; that during the same period he was a member of the Department of Industry for the State of Washington and was consultant for nervous and mental diseases during the same time he was a member of the King County Insanity Commission which he held for a period of five years in Seattle; that he examined plaintiff for the first time on the 14th or 15th of August, 1931, and that he had examined him again at Yakima just a few days previous to the date of his testifying; that the purpose of the examination was to determine plaintiff's mentality and nervous [47] condition; that he made a complete mental and nervous examination of plaintiff, which consisted of a series of tests used to determine the reaction on all the different muscular structure of the body, especially symptoms and everything pertaining to the nervous system. It consisted of a series of questions connected with determining whether the man had delusions or hallucinations, and further consisted in testing out the nervous structure of the individual as to responsibility and that he had made numerous tests of the plaintiff, all the tests which he made in every standard examination for neurology; that he spent the whole of one afternoon making these tests; that he gave plaintiff a test known as Sargeant's White Line Test and as a result of his examination and the test positively concluded that plaintiff was suffering from asthenia which means a general weakening of the greater muscular physical system;

(Testimony of Dr. Royal B. Tracy.)

that asthenia is a nervous condition and always associated with neurasthenia; that neurasthenia means complete physical and nervous exhaustion of the system brought on as a result of severe mental shock or physical shock, or both; that the Sargeant's White Line test is made by taking a pencil *of* a blunt object of some sort and striking it across the chest, and usually by striking it across the abdomen. In a normal being the reaction to that is a red spot that remains for a short time and completely disappears without any sign or evidence of any kind left. According to the degree of exhaustion, this line remains and gets darker and darker until it finally disappears. The witness testified that he had known cases where it lasted as long as an hour; that in plaintiff's case the line lasted about an hour; that the test is a positive one and that poisons generated from active tuberculosis would affect the nervous system; that the condition of neurasthenia found [48] from his examination is a permanent condition and that even without tuberculosis plaintiff would not be able to work.

“Q. Is that condition you found from your examination one that is reasonably certain to remain the remainder of this person's life or is it curable?”

A. It is a permanent condition.

Q. Will this man ever be able to follow a gainful occupation continuously?

A. Never, even if he did not have tubercu-

(Testimony of Dr. Royal B. Tracy.)

losis would he be able to stand up under the effort.

Q. Would it make his condition worse or not to engage in work?

A. As I said, it would be impossible for him to do any kind of work." (R. 120)

Counsel then propounded the same hypothetical question as that given to the other doctors who had testified on behalf of plaintiff. The same objection was interposed by defendant and overruled and exception taken, and the doctor, in answer to said question gave as his opinion that plaintiff was totally and permanently disabled at the date of his separation from the service May 28, 1919.

On Cross Examination

the witness testified that he had testified as an expert witness in a large number of war risk insurance cases; maybe 15 or 20; that he had made no particular arrangements about his fee for testifying in this case; that he did have an understanding that he would be paid a reasonable fee for his services and that his fee in the case was to be contingent upon the winning of the suit; that if plaintiff did not win the law suit witness would get nothing; that in the event he won the law suit the amount he received would be up to plaintiff, but that he expected to have adequate pay for his services and that his services cost money.

(Testimony of Dr. Royal B. Tracy.)

On further Cross Examination he stated that he would expect at least \$300.00 as a fee.

“Q. Where do you practise at the present time? [49]

A. In Seattle.

Q. How long have you been practicing there?

A. In that office about eight months.

Q. Where was your office prior to the one you occupy now?

A. I was in the Green Building.

Q. In Seattle?

A. Yes.

Q. When did you give up your office up there?

A. I gave the office up there about—I can't recall just the time, but I haven't had an office in Seattle for a period of about two years.

Q. But you have been practicing medicine in Seattle?

A. I have been taking care of regular cases, and acting as expert witness.

Q. Isn't it a fact you have had practically no medical practice except appearing as an expert witness in court?

A. I have had medical practice. I didn't maintain an office in Seattle because I prefer to live in another part of the country—right across the Sound.” (R. 124)

(Testimony of Dr. Royal B. Tracy.)

On further Cross-questioning, the doctor testified that he knew the cause of plaintiff's neurasthenia; that it was the result of shell shock sustained by the plaintiff while [50] in the service, due to the explosion of bombs and shells; that he did not have to have a history in this case; that he could tell from his examination about the length of time it would take his neurasthenia to develop; that he had found plaintiff suffering complete exhaustion of the suprarenal gland which means that the gland has no ability to restore itself whatsoever; that he had given plaintiff the Sargeant's White line test and caused him to go through certain movements, jumping up and down and holding his hand out to see if it trembled, or not. That it was his opinion that plaintiff's condition was incurable, because there had been complete exhaustion of the suprarenal gland; that he could not tell from his examination when this gland had become totally exhausted, but that he could surmise from the history of the man, being exposed to artillery fire and exposure, that he was of the opinion that the man now had a phychosis; that the long continued use of alcohol might affect plaintiff's stomach and might affect him mentally, but that it didn't have an adverse affect on a man's nervous system; that undoubtedly one of the best treatments for a neurasthenic patient was to give him a drink occasionally.

(Testimony of Dr. Royal B. Tracy.)

On Re-direct Examination

witness further testified that he did not think plaintiff's health had been affected by drinking, for the reason that plaintiff had a very good memory; that he considered plaintiff's memory exceptional. That he could not say how much liquor it would take to cause plaintiff to become intoxicated, but that ordinarily a nervous person required but little liquor to become intoxicated, but that in his opinion nothing that plaintiff could have done would have changed his condition of total and permanent disability after he was discharged from the army. [51]

On Re-cross Examination,

witness further testified that a neurasthenic patient having tuberculosis would have lived in a depleted state and could never be normal again, even though the tuberculosis was arrested; that the effect of shell shock is to produce what is known as amnesia in which a patient has been known to actually forget his name.

Witness excused and plaintiff rested his case, at which time the Government moved for an order of non-suit against plaintiff, or, in the alternative, a directed verdict on the ground and for the reason that plaintiff had failed to establish by a fair preponderance of the evidence, that plaintiff was totally and permanently disabled by reason of pul-

(Testimony of Dr. Albert C. Feaman.)

monary tuberculosis, chronic, active, chronic bronchitis, chronic myocarditis or neuresthenia at the time when his war risk insurance was in force and effect, which motion was denied and exception allowed to the defendant.

Dr. ALBERT C. FEAMAN

was called as a witness on behalf of defendant, and testified that he is a physician and surgeon, a graduate of the University of Minnesota in 1919; that he specialized in heart and lung diseases since his graduation; that he was resident physician for the Municipal Tuberculosis Sanitarium from 1919 to 1922, at Seattle, and after that was one year in Portland, Oregon, for the United States Government in charge of heart and lung diseases for the sub-district of Portland; that he was three months in Boise, Idaho; that he took a post graduate course in New York in January and February, 1925, and in September took another post graduate course, and since that time I have been continuously in charge of the regional office at Seattle for the United States Veterans Administration for heart and lung diseases; that he examined the plaintiff August 11, 1931; [52] that he made a heart and lung examination; that he found his blood pressure, pulse and respiration normal; that from his examination he diagnosed plaintiff as having pulmonary tuberculosis, chronic, moderately advanced, healed, with chronic bronchitis, moder-

(Testimony of Dr. Albert C. Feaman.)

ate; that bronchitis is not an unusual disease, especially for persons living in moist atmospheres; that it is not a disabling disease nor fatal; that at the time of his examination on August 11, 1931, he found no evidence of active tuberculosis.

Witness then examined plaintiff's X-ray pictures and stated that he had broad experience in studying X-rays and making diagnoses of the lungs from X-ray pictures, and that the mottling referred to in the pictures did not indicate tuberculosis and that there was nothing appearing in plaintiff's X-ray pictures from which a diagnosis of tuberculosis could be made.

“Q. Based upon your examination of the plaintiff on August 11, 1931, and your findings at that time, what is your opinion as to his ability to follow some gainful occupation at that time?

A. Well, I will have to explain that by stating there are five different things representing treatment of tuberculosis. I will say that a sixth has been added now. First, in the beginning of the treatment I always recommend rest in bed; second, good food; third, continuous twenty hours in the open air where the individual has the opportunity for rest without exercise; fourth, his mental outlook, keeping cheerful and in a bright frame of mind, read good books, and see good things; fifth, exercise, this is a part of the end treatment, walking and little jobs. Around the Seattle Sanitorium each man

(Testimony of Dr. Albert C. Feaman.)

is assigned certain forms of work as a constructive program, to keep the mind in a happy condition so they feel they are honestly earning something, producing something, earning their way. Exercise consists in making them walk by gradually increasing the time up to a mile, two miles, three miles, four miles, and so forth. Now, the sixth is surgery, a removal of the ribs for collapse of lung permanently, and artificial pneumothorax collapse partial by air pneumolepsis phrenectomy * * *. Now, I say exercise is as valuable on the other end of the treatment as rest is in the beginning. It hardens the fibrous deposits around the tubercles as well as giving muscle tone to all of the muscles of the body. [53]

Q. Well, doctor, then you found an arrested condition?

A. That is how I classified it, yes.

Q. What is your opinion as to his ability to follow a substantially gainful occupation?

A. I think there are many occupations he could follow and which would very much improve his mental attitude.

Q. The fact that a man is suffering from—may have had tuberculosis is that an indication he cannot perform labor?

A. We don't recommend hard mental labor, like long shoring or digging but lighter forms of work certainly are indicated.

Q. Doctor, from your examination of the plaintiff in August, 1931, what is your opinion

(Testimony of Dr. Albert C. Feaman.)

as to whether or not he was permanently and totally disabled from any heart or lung condition at that time?

A. I think I stated it was arrested tuberculosis, no cardiac pathology, and no permanent and total disability." (R. 137-8)

On Cross Examination

the witness testified that the excessive use of liquor would have an injurious effect upon a chronic heart affection or any other chronic disability; that it was probable that engaging in work would reactivate or cause a reaction of the tuberculosis. But that a person suffering from tuberculosis which had been arrested by treatment, could engage in light labor; that he had seen patients in all three stages, that is, in far advanced tuberculosis, able to drive taxicabs in Seattle and making a good existence; that he did not make an examination of plaintiff with reference to insurance; that his examination was made for the purpose of determining whether the plaintiff was entitled to compensation and whether he needed treatment, and that he had no interest in the court actions; that at the time he examined plaintiff, witness had the prior examination file before him; that chronic neurasthenia might cause the patient to be some weaker and be detrimental to one suffering from tuberculosis.

Dr. A. D. TOLLEFSON

testified on behalf of defendant, that he was a graduate of the Northwestern Medical School [54] in 1910; that he had been engaged in the practice of his profession since the date of his graduation; that he specialized in diseases of the chest since 1922; that he is at the present time in the United States Veterans hospital at Walla Walla, which is a general hospital; that he had examined plaintiff in Seattle in February, 1924, giving him a chest examination only; that plaintiff was given the usual chest examination;

“Q. What were the findings?

A. No essential findings at the time I examined him—my impression is the physical findings did not indicate any t. b.—that is my impression of the case.

Q. You found nothing to indicate the presence of tuberculosis?

A. No.

Q. Doctor, based upon your observation and examination of the patient at that time what is your opinion as to the ability of the plaintiff to follow some gainful occupation?

A. Certainly if I didn't find anything wrong with his chest there could be no reason why the man couldn't successfully carry on in any occupation.” (R. 144-5)

Upon Cross Examination

the witness testified that he examined plaintiff on the 19th day of February, 1924; that he found no

(Testimony of Dr. A. D. Tollefson.)

clinical evidence of pulmonary tuberculosis.

“Q. Did you have before you the examinations and diagnosis of previous medical examinations?

A. Yes, as a rule if the patient had his claim filed in the Regional office in Seattle with the request for examination the file is sent in. Occasionally, however—

Q. All I wish to know is did you have the file there for your use?

A. I couldn't tell you that right now.

Q. Did you render your opinion at that time no true tuberculosis existed had you known of the pulmonary condition?

A. I said there were no clinical evidence of pulmonary condition—pulmonary tuberculosis.

Q. If you should find, or if in examining these medical records you found he had a previous diagnosis of tuberculosis pulmonary, chronic active, middle and upper, right and left apex when in the hospital in Newport News, Virginia, February 2d, 1919, would you say no true tuberculosis existed?

A. If that was my impression I would, sure, in spite of the fact he probably had a history of tuberculosis. [55]

Q. Did you hear Dr. Feaman's report in 1931 with a diagnosis of tuberculosis pulmonary?

A. Yes, I think he said—

(Testimony of Dr. A. D. Tollefson.)

Q. Moderately advanced, arrested?

A. Yes sir.

Q. Would that be an indication of the existence of tuberculosis?

A. It would indicate the man at some time had had tuberculosis.

Q. Do you concur in this statement of Dr. Feaman's that a man far advanced in tuberculosis can work continuously?

A. If he was active he couldn't, but if not active he may be far advanced and have a complication of some kind that would make it far advanced and still be able to work.

Q. If he does work when it is inactive isn't it likely it will re-activate his tuberculosis—if it is inactive and he works isn't it possible it will cause this tuberculosis to become active again?

A. If you are speaking of far advanced case and he becomes inactive he is fortunate to become inactive. These things do occur frequently. If he then should subject himself to exposure or to the unusual things he would then become active again of course more easily than a man with incipient form or minimal." (R. 145-6-7)

On Re-direct Examination,

Dr. Tollefson testified that the usual and customary expert fee for a doctor testifying, was \$25.00 per day.

(Testimony of Dr. A. D. Tollefson.)

“Re-cross Examination

By Mr. FLUENT:

“Q. If a man would have moderately advanced tuberculosis—if experience shows that with each effort to work it caused a break down would you say that it was injurious for that man to work, or not?

A. Well, of course, if he shows he is having a break down it is certainly injurious for him to work—the question is has the man had a sufficient treatment in the first place.” (R. 147)

At this point defendant offered in evidence certain testimony set up in an affidavit, for the continuance of certain witnesses, as follows:

“That the said Harry Telfer, one of said witnesses, would testify that from the year 1925, and down to the present time he has lived and resided in the vicinity of Elcho, Wisconsin, and that from at least the year 1925 down to the present time he has been personally acquainted with the [56] plaintiff, Thomas Bee Williams and saw the said plaintiff a great many times during the years 1925 to 1927, inclusive; that he had occasion to observe the physical and mental condition of said plaintiff during the years 1925 to 1927, inclusive, and during this entire time the said Telfer observed that the said Williams was not suffering from any phy-

sical or mental condition and had no physical or mental disability in so far as the said Telfer observed, except that during a period of time when the plaintiff, Thomas Bee Williams, was under the influence of alcoholic beverages; that Williams during the years 1925 to 1927 was frequently intoxicated and addicted to the use of alcoholic beverages, and that this physical or mental condition was the only disability which the plaintiff had, according to the observation of the witness Telfer during the period of time that the plaintiff, Thomas Bee Williams, lived and resided in the vicinity of Elcho, Wisconsin, during the years 1925 to 1927, inclusive.

Affiant further states that the said witness, Richard Snyder, will testify that at the present time he is comptroller of the Forest Lumber Company at Elcho, Wisconsin, and that during the years 1925 to 1927, said Snyder lived in Elcho, Wisconsin, and was well and personally acquainted with the plaintiff, Thomas Bee Williams, and had frequent occasions during the years above mentioned to observe the mental and physical condition of the plaintiff, Thomas Bee Williams, and that the said Snyder will testify that he observed no mental or physical disability of the plaintiff during the years aforesaid, except at the times when the said Thomas Bee Williams was under the influence of intoxicating liquors, which was on a great many occasions, and that the plaintiff, Thomas Bee Williams, was addicted to the habitual use of al- [57] coholic beverages.

Affiant further states that the witness, Nick Visser, will testify that he lived and resided in the

vicinity of Elcho, Wisconsin, during the years 1925 to 1927, inclusive, and during the period of time when the plaintiff, Thomas Bee Williams, lived and resided in that vicinity; that the said Visser had occasion to observe at very frequent intervals the mental and physical condition of Thomas Bee Williams during the years 1925 to 1927, inclusive; that the said Visser did not observe any mental or physical disability which the said Williams had during the period of time aforesaid with the exception that during this time the said Williams was frequently intoxicated and addicted to the use of alcoholic beverages.

R. D. LANG,

testified on behalf of defendant, that he was a police officer of Yakima; had been on the police department since 1928; that he had spent some time in the sheriff's office, and that his present occupation was a plain clothes man; that he had known plaintiff since 1928; that he recalled having him under arrest and observed him around the police station and on the streets of Yakima a number of times;

“Q. Where on the streets in Yakima did you see him?

A. Generally down on what we call ‘Skid row’ down around Front Street in that part of town.

Q. Have you seen him a number of times down there? A. Yes.

(Testimony of R. D. Lang.)

Q. What was his mental or physical condition?

A. Generally when I noticed him he would be under the influence of liquor, or partially under the control of liquor." (R. 150-1)

That the first time he saw plaintiff was in 1928, at which time he was acting as jailer of the city hall; that plaintiff was brought in and booked as a drunk.

"Q. How often would you say you have seen him since that time?" [58]

A. I would say somewhere around fifteen or twenty times.

Q. And all of those times was he in the same condition?

A. Either in a very drunken condition or he would be on the streets and had been drinking and more to get him out of sight I would tell him to get out of sight or under cover.

Q. Did you send him home on many occasions?

A. I wouldn't say many, but several." (R. 151)

On Cross Examination

witness testified:

"Q. You only saw him on fifteen or twenty occasions altogether—you testified you saw him on fifteen or twenty occasions.

A. That's all I recall, yes." (R. 152)

That he did not know where plaintiff was in the fall of 1932, but in January, of 1932 he knew plain-

(Testimony of R. D. Lang.)

tiff was in Yakima; that he did not know where plaintiff was living in 1928, 1929, 1930 and 1931; that plaintiff was not in town all the time, but that witness had seen him in Yakima frequently; that the "skid row" referred to was a neighborhood where a low class of individuals and hangers-on congregated.

At the request of the Government, the depositions of Mr. H. W. Hanson and Dr. C. O. Decker were then published.

H. W. HANSON'S TESTIMONY

was as follows:

That he resided in Crandon, Wisconsin, for a period of about 13 years; that he was a druggist by occupation; that he knew the plaintiff; that he had known him about ten years; that he was familiar with the plaintiff's habits as to indulgence in intoxicating liquor and that from his observation plaintiff seemed to be a very heavy drinker and he had seen under the influence of liquor several times.

"Q. Do you know of any physical ailment or disability?

A. Not to my knowledge. No, I never observed any physical disability." (R. 154)

That his physical condition seemed fair, though he wasn't a robust man; that plaintiff's reputation for sobriety [59] in the community wasn't good; that from his own observation, he would say that plaintiff was a drinking man; that he had seen him

(Testimony of C. O. Decker.)

pretty well under the influence of liquor, and seen him laid out flat on his back probably three or four times in a period of about two years.

C. O. DECKER

testified by deposition:

That he resided at Crandon, Wisconsin; age 62; that he was a physician and surgeon, a graduate of the Marquette University at Milwaukee, in 1901; licensed to practice medicine in the State of Wisconsin; that he had been actively engaged in the practice of medicine since 1901, at Crandon, Wisconsin; that he is acquainted with plaintiff, who formerly lived in Crandon; that he had known plaintiff about ten years ago for a period of two years or better, shortly after the war; that he had examined the plaintiff, having been called by some stranger to go to plaintiff's home. [60]

At this point plaintiff objected to the testimony of the doctor on the ground of privilege existing between a doctor and his patient, which objection was sustained and exception allowed to defendant.

The material parts of the deposition of Dr. Dailey was also excluded upon the same ground, to which exclusion the defendant excepted and exception allowed.

Plaintiff was then recalled to the witness stand and cross examined by Mr. Dawson:

(Testimony of Thomas Bee Williams.)

Plaintiff testified as follows: That at the date of his discharge he had filed a claim for compensation. Plaintiff then identified Defendant's Exhibit B as one of the claims made out in 1924, identifying his signature on said claim, in which he had given the name of Dr. C. O. Decker of Crandon, Wisconsin, as a reference.

The deposition of Dr. Decker was again offered and the same ruling made by the Court.

In order to put the matter fairly in the record, the depositions of Dr. Dailey and Dr. Decker offered in evidence the Court's ruling:

"I will sustain the objection on the ground they contain privileged communications or contain evidence of a privileged character."

That portion of

DR. DAILEY'S DEPOSITION

pertaining to his name, qualifications and place of residence was read into the record and that portion of the deposition dealing with the witness's general knowledge of plaintiff's reputation for truth and veracity was admitted in evidence, the testimony being as follows:

Q. Doctor, do you know whether the plaintiff has a reputation as to his veracity in the community in and about [61] Elcho?

A. Yes, he has.

Q. What is that reputation?

A. He is a very unreliable man and has a poor reputation for veracity.

The Government's case was then closed, at which time defendant made the following motion:

“The Government renews its motion for an order of non-suit, or, in the alternative, for a directed verdict in favor of the defendant, upon the grounds and for the reason that plaintiff has failed to establish by a preponderance of the evidence, or by any competent evidence that the plaintiff in this case was permanently and totally disabled from following a gainful occupation within the meaning of the war risk insurance act.”

The motion was denied and exception allowed, at which time plaintiff joined with defendant's motion for a directed verdict in his favor.



Whereupon the Court dismissed the jury and returned his verdict in favor of the plaintiff, finding that the plaintiff had been totally and permanently disabled as early as February 2, 1919, to which ruling defendant objected and objection allowed.

[62]



CERTIFICATE OF JUDGE TO
BILL OF EXCEPTIONS.

United States of America,
Eastern District of Washington.—ss.

I, J. STANLEY WEBSTER, United States District Judge for the Eastern District of Washington, and the Judge before whom the above entitled action

was tried, to-wit, the cause entitled Thomas Bee Williams, Plaintiff, vs. United States of America, Defendant, No. L-1709, in said District Court,

DO HEREBY CERTIFY, that the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein; and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence, oral and in writing therein, and that the above and foregoing bill of exceptions was duly and regularly filed with the Clerk of the said Court and thereafter duly and regularly served within the time authorized by law; and that amendments were proposed to said bill of exceptions and same have been allowed and are embodied therein; that due and regular written notice of application to the Court for settlement and certifying said bill of exceptions was made and served upon the plaintiff, which notice specified the place and time (not less than three days nor more than ten days after the service of said notice) to settle and certify said bill of exceptions.

Dated this 8th day of March, 1934.

J. STANLEY WEBSTER

United States District Judge.

[Endorsed]: Lodged Feb. 9, 1934.

[Endorsed]: Filed Mar. 8, 1934. [63]

[Title of Court and Cause.]

STIPULATION AND ORDER.

IT IS STIPULATED AND AGREED between Russell H. Fluent, attorney for plaintiff, and Roy C. Fox, United States Attorney for the Eastern District of Washington, that all of the original exhibits, introduced in evidence by either plaintiff or defendant at the trial of the above entitled cause, may be forwarded to the Clerk of the Circuit Court for the Ninth Circuit, for inspection by said Court in considering the appeal in the above entitled cause.

RUSSELL H. FLUENT,

Attorney for Plaintiff.

ROY C. FOX,

Attorney for Defendant.

Upon stipulation of counsel, it is ORDERED that all of the original exhibits introduced by either plaintiff or defendant at the trial of the above entitled action, be forwarded by the Clerk of the above entitled Court to the Clerk of the Circuit Court for the Ninth Circuit, and that the same be returned to the Clerk of this Court after the disposition of said cause on appeal.

Dated this 10th day of March, 1934.

J. STANLEY WEBSTER

United States District Judge.

[Endorsed]: Filed Mar. 10, 1934. [64]

[Title of Court and Cause.]

CITATION ON APPEAL.

To THOMAS BEE WILLIAMS, and to RUSSELL H. FLUENT, your attorney:

You are hereby notified that in the above entitled court and cause an appeal has been allowed the defendant, the United States of America, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California within thirty days from the date of this citation, to show cause, if any there be, why the judgment in said cause should not be reversed.

WITNESS the HONORABLE J. STANLEY WEBSTER, United States District Judge, this 8 day of March, 1934.

J. STANLEY WEBSTER

United States District Judge.

Attest: A. A. LaFRAMBOISE,
Clerk.

Copy of above citation received this 9th day of March, 1934.

RUSSELL H. FLUENT,

Attorney for Plaintiff. [65]

[Title of Court and Cause.]

PRAECIPE ON APPEAL.

To the Clerk of the United States District Court
for the Eastern District of Washington:

Please prepare and certify to the United States
Circuit Court of Appeals, Ninth Circuit, the fol-
lowing records, pleadings, files and papers in the
above entitled action:

Complaint

Answer

Verdict

Amended judgment

Petition and order allowing appeal

Assignments of error

Order extending time for filing bill of exceptions

Bill of exceptions

Citation on appeal

Praecipe on appeal

All original exhibits

Stipulation and order to forward original ex-
hibits to Clerk of Circuit Court.

ROY C. FOX

United States Attorney.

[Endorsed]: Filed Mar. 10, 1934. [66]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages numbered 1 to 66 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Yakima in said District this 14th day of March, A. D. 1934.

[Seal]

A. A. LaFRAMBOISE, Clerk,
By Margaret E. Bailey, Deputy. [67]

[Endorsed]: No. 7431. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Thomas Bee Williams, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed March 17, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.

